

# FORMALISING LOBBYING: A NECESSITY IN A DEMOCRATIC SETUP

## I. INTRODUCTION

Lobbying is a complex phenomenon, generally used to refer to activities related to influencing policy-making, particularly to influence a legislator's vote to meet personal interests.<sup>1</sup> Different countries have taken distinct approaches to understand and address lobbying.<sup>2</sup> However, conceptually lobbying has remained difficult to address, due to the difficulty in identifying those interactions with legislators that constitute lobbying and those that are merely regarded as forms of advocacy.<sup>3</sup> However, a large part of the debate stems from the negative perception of lobbying, which arises primarily due to the lack of clarity in the type of policy that is derived from such activities.<sup>4</sup>

There are many healthy forms of lobbying that thrive in democracies, such as policy advocacy done by think tanks, citizens' groups, non-governmental organizations, etc., which has played an immensely positive role in representing the concerns of ordinary citizens before regulators and draftsmen. While earlier, corporate entities believed in maintaining a safe distance from the government, of late, they are plunging into this arena.<sup>5</sup>

Colloquially and under most legal regimes, corporate lobbying refers to the communication with a legislator or bureaucrat with the motive of influencing decision-making on a policy matter.<sup>6</sup> This is done to streamline governmental outlook on the niches of the sector/industry being regulated. There are various industrial groups that exist for this purpose – FICCI

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<sup>1</sup> Black's Law Dictionary, 1022 (9th ed., 2009).

<sup>2</sup> OECD, Transparency and Integrity in Lobbying, 3 (2013), available at <https://www.oecd.org/gov/ethics/Lobbying-Brochure.pdf> (Last visited on June 17, 2017).

<sup>3</sup> KLEMENS JOOS, LOBBYING IN THE NEW EUROPE, 15-17 (2011).

<sup>4</sup> *Id.*; Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics and Public Policy*, CJLPP Vol 16 Iss 1, 20-29 (2006).

<sup>5</sup> See generally Lee Jared Drutman, *The Business of America is Lobbying: The Expansion of Corporate Political Activity and the Future of American Pluralism* (2010) (Ph.D. dissertation, University of California, Berkeley), available at <http://escholarship.org/uc/item/1mh761v2> (Last visited on June 17, 2017).

<sup>6</sup> Kaushiki Sanyal & Harsimran Kalra, *A Case for Democratising Lobbying in India*, May 28, 2013, available at <https://policyblog.oxfordindiasociety.org.uk/2013/05/28/a-case-for-democratising-lobbying-in-india/> (Last visited on June 17, 2017).

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(Federation of Indian Chambers of Commerce & Industry), CII (Confederation of Indian Industry), ASSOCHAM (Associated Chambers of Commerce of India), to name a few.

In practice, lobbying is resorted to by corporates in order to protect themselves from policies that could harm their interests and by seeking competitive advantage by seeking favourable policy changes. It thus takes nefarious forms – from hiring of ex-governmental officials by corporate giants and infesting of on-going governmental discussions on policy issues to pumping of huge pay-outs into political party funding during election campaigns.<sup>7</sup> The phenomenon is not just limited to the influence sought to be exerted by corporates on laws but also includes manoeuvring to influence governmental and ministerial positions to secure for themselves perpetual support from the incumbent governments.<sup>8</sup> For this reason, corporate lobbying has become synonymous with bribery, at least in public consciousness. Even when lobbying stays within the limits of legality, it can cause severe damage on the polity and the economy. For instance, the US experience has shown that firms leveraged lobbying to prevent regulators from enacting laws which could have controlled mortgage lending by financial institutions, thereby suggesting a link between lobbying and the consequent financial crisis.<sup>9</sup>

Lobbying exists in some form or another in most countries; however, despite the ramifications it can have on the judiciousness of law-making, it is an unregulated activity in most jurisdictions.<sup>10</sup> Among the OECD countries, lobbying regulations can only be found only in roughly one-third of the member countries.<sup>11</sup> On the other hand, some countries such as the United States,<sup>12</sup>

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<sup>7</sup> Pradip Thakur, *Profile of the Great Indian Lobbyist*, November 28, 2010, available at <http://timesofindia.indiatimes.com/home/sunday-times/deep-focus/Profile-of-the-Great-Indian-Lobbyist/articleshow/7002491.cms> (Last visited on June 17, 2017).

<sup>8</sup> Money Control, *Should India legalize/regulate lobbying*, December 11, 2010, available at [http://thefirm.moneycontrol.com/news\\_details.php?autono=504614](http://thefirm.moneycontrol.com/news_details.php?autono=504614) (Last visited on June 17, 2017).

<sup>9</sup> See generally Denizlgan, Prachi Mishra, & Thierry Tressel, *A Fistful of Dollars: Lobbying and the*

*Financial Crisis* (IMF Working Paper, WP/09/287, 2009) available at <http://www.imf.org/external/pubs/ft/wp/2009/wp09287.pdf> (Last visited on June 17, 2017); Steven Pearlstein, *Blame for financial mess starts with the corporate lobby*, August 13, 2011, available at [https://www.washingtonpost.com/business/economy/steven-pearlstein-blame-for-financial-mess-starts-with-the-corporate-lobby/2011/08/08/gIQA3zMIDJ\\_story.html?utm\\_term=.c00de758c150](https://www.washingtonpost.com/business/economy/steven-pearlstein-blame-for-financial-mess-starts-with-the-corporate-lobby/2011/08/08/gIQA3zMIDJ_story.html?utm_term=.c00de758c150) (Last visited on June 17, 2017).

<sup>10</sup> Transparency International, *Controlling Corporate Lobbying and Financing Political Activities*, June 2009 available at [http://transparency.ee/cm/files/lisad/corporate\\_lobbying.pdf](http://transparency.ee/cm/files/lisad/corporate_lobbying.pdf) (Last visited on June 17, 2017).

<sup>11</sup> OECD, *supra* note 2.

<sup>12</sup> The Lobbying Disclosure Act, 1995 (U.S.A.).

Australia,<sup>13</sup> Canada,<sup>14</sup> Germany,<sup>15</sup> Israel,<sup>16</sup> Hungary,<sup>17</sup> Taiwan,<sup>18</sup> Poland,<sup>19</sup> Slovenia<sup>20</sup> and Lithuania<sup>21</sup> treat lobbying as a legitimate activity, but regulate it through legislation. However, in the Indian context, corporate lobbying has not been subject to sufficient scrutiny. As India develops as an economy, there is a likelihood for increased pressures faced from corporate entities to influence policy in the interest of profitability.<sup>22</sup> As pressure marks from both domestic and international entities, it becomes prudish to address the needs of all stakeholders, including the citizens of the country on the effects and impact of lobbying.

It is in this context that this note aims to discuss the changes required in the current legal framework to address the menace of lobbying. In Part II, we will analyse the existing legal framework governing lobbying in India and how it has failed to address contemporary instances of lobbying and how in the long run it does not address central questions relating to lobbying. Additionally, we will contrast this position with the positions of lobbying in mandatory and voluntary regimes of lobbying regulation. In Part III, we will explain and explore the Public Choice Theory, which offers an economic-based understanding of policy-making and how policymakers, interest groups and members of the public actively engage with one another in order to create a supply and demand of policy. Based on this argument, in Part IV, we will explore how the access to information can be used to ensure that the public has the opportunity to counter lobby effectively by receiving fair information and having a platform to make their interests known to policymakers. Part V contains concluding remarks.

## II. LEGAL FRAMEWORK GOVERNING LOBBYING

In this Part, we will discuss the current legal framework relating to lobbying in India. To provide a better understanding of the scope and effect of lobbying regulations, reference will be made to the position of law in the

<sup>13</sup> Lobbying Code of Conduct, 2013 (Australia).

<sup>14</sup> The Lobbying Act, 1985 (Canada).

<sup>15</sup> Library of Congress, Lobbying Disclosure Laws: Germany, April 17, 2017 available at <https://www.loc.gov/law/help/lobbying-disclosure/germany.php> (last seen on June 19, 2017) (Germany maintains a voluntary register to identify lobbyist and does not have any official law regulating lobbying).

<sup>16</sup> Knesset Law (Amendment) (Israel), 2008.

<sup>17</sup> XLIX Law (Hungary), 2006.

<sup>18</sup> Lobbying Act, 2007 (Taiwan).

<sup>19</sup> Act 169 of 2005 (Poland).

<sup>20</sup> Integrity and Prevention of Corruption Act, 2010 (Slovenia).

<sup>21</sup> Law on Lobbying Activity, 2000 (Lithuania).

<sup>22</sup> Vibhuti Agarwal, *What Is the Future of Lobbying in India?*, December 16, 2010, available at <https://blogs.wsj.com/indiarealtime/2010/12/16/what-is-the-future-of-lobbying-in-india/> (Last visited on June 17, 2017).

USA, which has a mandatory system of lobbying regulation, as well as in other jurisdictions that follow a voluntary system of lobbying.<sup>23</sup>

## A. INDIA

In March 2013, a bill to regulate lobbying was introduced in the Lok Sabha for the first time as a private member's bill by a Bharatiya Janata Dal member, Kailash Narayan Singh Deo.<sup>24</sup> The bill was introduced as a response to the Nira Radia tapes scandal,<sup>25</sup> as well as to the disclosures made by Walmart,<sup>26</sup> of the bribes it paid in India as part of its lobbying activities to secure access to the Indian multi-brand retail market.<sup>27</sup> Some doubted the genuineness underlying the introduction of the Bill,<sup>28</sup> as it sought to legalise lobbying activity defining is to mean “an act of communication with and payment to a public servant with the aim of influencing”<sup>29</sup> a legislation, thereby blurring the lines between legitimate lobbying and grossly illegal gratification. This also stood in sharp conflict with the Prevention of Corruption Act, 1988, which prohibits a public servant from taking any gratification, other than legal remuneration, in respect of an official act.<sup>30</sup> Nonetheless, the Bill was once again introduced in the Lok Sabha by Kalikesh Narayan Singh Deo in February 2016,<sup>31</sup> but has failed to see the light of the day.

Absence of a regulatory regime in this area on one hand hurts the right to information of the citizens, and limits their power to critique a law due to asymmetric information. On the other, it is in conflict the goal of “ease of doing business”, which is so eulogised by the current government – this is because, while the practice is permissible in other developed jurisdictions after compliance with disclosures, it still brings connotations of corruption with itself in India, thereby making it difficult for companies from such countries to

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<sup>23</sup> Kristina Grosek & Eulalia Claros, *Regulation of Lobbying across the EU*, December 2016, available at [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/595830/EPRS\\_ATA\(2016\)595830\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/595830/EPRS_ATA(2016)595830_EN.pdf) (Last visited on June 17, 2017).

<sup>24</sup> The Disclosure of Lobbying Activities Bill, 2013, 14 of 2013.

<sup>25</sup> B.S. Arun, *Radia tapes: Scandal in the media*, November 27, 2010, available at <http://www.deccanherald.com/content/116306/radia-tapes-scandal-media.html> (Last visited on June 17, 2017).

<sup>26</sup> Business Standard, *Walmart paid millions in bribes in India: WSJ*, October 20, 2015, available at [http://www.business-standard.com/article/international/walmart-paid-millions-in-bribes-in-india-wsj-115101900120\\_1.html](http://www.business-standard.com/article/international/walmart-paid-millions-in-bribes-in-india-wsj-115101900120_1.html) (Last visited on June 17, 2017).

<sup>27</sup> Pankaj K.P. Shreyaskar, *To curb black money, legalise lobbying*, January 6, 2015, available at <http://www.thehindubusinessline.com/opinion/to-curb-black-money-legalise-lobbying/article6760702.ece> (Last visited on June 17, 2017).

<sup>28</sup> Bhargavi Zaveri, *The Disclosure of Lobbying Activities Bill, 2013*, 48(24) EPW (2013).

<sup>29</sup> The Disclosure of Lobbying Activities Bill, 2013, §2(f).

<sup>30</sup> The Prevention of Corruption Act, 1988, §7.

<sup>31</sup> Business Standard, *Private Member Bill for Registration of Lobbyists in Lok Sabha*, February 26, 2016, available at [http://www.business-standard.com/article/pti-stories/private-member-bill-for-registration-of-lobbyists-in-lok-sabha-116022601101\\_1.html](http://www.business-standard.com/article/pti-stories/private-member-bill-for-registration-of-lobbyists-in-lok-sabha-116022601101_1.html) (Last visited on June 17, 2017).

push for the requisite regulatory changes they need to establish themselves in the Indian market in a legal fashion.<sup>32</sup>

## B. USA

USA (United States of America) is regarded as having one of the most active lobbying communities in the world, with an entire industry dedicated to affect policy-making.<sup>33</sup> The extent to which corporate lobbying is endorsed under its legal framework can be demonstrated by the case of *FEC v. Citizens United*.<sup>34</sup> In this case, the US Supreme Court stated that corporations, namely super PACs,<sup>35</sup> cannot be subjected to any limit on the amount spent on funding of political campaigns.<sup>36</sup> They reserved this right, stating that it was protected by the First Amendment and hence could not be impeded by the legislature by means of a statutory enactment.<sup>37</sup>

The regulation of lobbying in the US is complex, with different regulations framed by each state.<sup>38</sup> The most significant legislation, however, is the Lobbying Disclosure Act, 1995 ('LDA').<sup>39</sup> The LDA requires a lobbyist making a lobbying contact to register with the Secretary of the Senate and the Clerk of the House of Representatives.<sup>40</sup> The registration requires the lobbyist to disclose the details of its own as well as its clients' business, besides details of any organization contributing more than \$10,000 to its lobbying activities in a semi-annual period, or any organization planning or supervising its lobbying activities in whole or in part.<sup>41</sup> The rules also require the lobbyist to disclose details of certain foreign entities which hold interest in the client.<sup>42</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Open Secret, *Lobbying Database*, available at <https://www.opensecrets.org/lobby/index.php> (Last visited on June 17, 2017) (as of 2016 the total amount spent on lobbying exceeded \$3 billion).

<sup>34</sup> *Citizens United v. Federal Election Commission*, 2010 SCC OnLine US SC 10 : 558 US 310 (2010).

<sup>35</sup> David G. Savage, *Supreme Court OKs unlimited corporate spending on elections*, JANUARY 22, 2010, available at <http://articles.latimes.com/2010/jan/22/nation/la-na-campaign-finance22-2010jan22> (Last visited on June 17, 2017) (super PACs are non-government organisations, that usually run in a charitable form, often for the purpose of funding political campaigns).

<sup>36</sup> Open Secret, *Campaign Spending*, available at <https://www.opensecrets.org/overview/limits.php> (Last visited on June 17, 2017) (This is despite individuals having a limit of approximately \$30,000).

<sup>37</sup> First Amendment, Constitution of the United States of America: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".

<sup>38</sup> Craig Holman & William Luneburg, *Lobbying and Transparency: A Comparative Analysis of Regulatory Reform*, 80-82, INTEREST GROUPS & ADVOCACY 1.1 (2012).

<sup>39</sup> Lobbying Disclosure Act, 1995 (U.S.A.).

<sup>40</sup> The Lobbying Disclosure Act, 1995 (U.S.A.), §4(1).

<sup>41</sup> The Lobbying Disclosure Act, 1995 (U.S.A.), §4 (b).

<sup>42</sup> The Lobbying Disclosure Act, 1995 (U.S.A.), §4 (b)(4).

In USA, lobbying is regarded as an inherent right under the Constitution, where even citizens have the right to lobby, in order to satisfy their interests.<sup>43</sup> With citizens being granted such rights, public lobbyists have actively taken into consideration matters that require attention, and work to address the needs of individuals in society.<sup>44</sup>

At the same time, there tends to be a very significant influence from interest groups that represent corporations.<sup>45</sup> Data suggest that corporations tend to have a very strong grip on the legislators at various levels, resulting in policies that exclusively address the needs of corporations.<sup>46</sup> This is regarded as one of the most significant dangers of lobbying, and without any protective measures it effectively results in the diminishing of the impact of democratic institutions.

### C. VOLUNTARY SYSTEMS OF LOBBYING

Generally, legal systems that have voluntary regulation of lobbying allow lobbyists to accept a code of conduct or to register themselves with an official body that records information pertaining to their activities.<sup>47</sup> This system has been adopted by countries like Germany.<sup>48</sup>

Though in principle, voluntary systems do actively encourage the disclosure of information, lack of any concise definitions or specific obligations result in furnishing of inconsistent or very limited information by the companies engaging in such activities.<sup>49</sup> Germany has a record known as the German Bundestag, which records the information of organisations that have volunteered to disclose their status and presently contains details of over

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<sup>43</sup> Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition And The Competition To Be Right*, Stan. L. & Pol'y Rev., 19, 23 (2008) available at [https://web.stanford.edu/group/slpr/previous/Volume19/Allard\\_19slpr23.pdf](https://web.stanford.edu/group/slpr/previous/Volume19/Allard_19slpr23.pdf) (Last visited on June 17, 2017).

<sup>44</sup> *Id.*

<sup>45</sup> Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(03), 564-581 (2014) available at [https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens\\_and\\_page\\_2014\\_-testing\\_theories\\_of\\_american\\_politics.doc.pdf](https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf) (Last visited on June 17, 2017).

<sup>46</sup> *Id.* (As stated by Gilens and Page, the impact of corporate lobbying on policy decision-making, particularly in USA, has resulted in policies that are highly skewed in the interest of corporations. In proportion, the interests of corporations when compared with the representations of citizens face a huge disparity. The lack of significant safeguards in the interests of the society at large, has resulted in the impairment of the interests of the wider public.)

<sup>47</sup> Transparency International, *Lobbying in Germany*, 2014 available at [https://www.transparency.de/fileadmin/pdfs/Themen/Politik/Lobbying\\_in\\_Germany\\_neu2.pdf](https://www.transparency.de/fileadmin/pdfs/Themen/Politik/Lobbying_in_Germany_neu2.pdf) (Last visited on June 17, 2017); Grosek & Claros, *supra* note 23 (several other countries like Spain, Italy, Poland and Croatia have voluntary systems of lobbying. France used to have a voluntary system, however in 2016, this shifted to a mandatory system).

<sup>48</sup> OECD, *supra* note 2.

<sup>49</sup> Holman & Luneburg, *supra* note 38.

2000 such organisations.<sup>50</sup> However, the information collected through such voluntary disclosures is extremely limited, and primarily includes the name and contact information of these organisations, without providing any material on the objective or the nature of lobbying activities carried on by these organisations.<sup>51</sup> A similar situation was prevalent in France, until 2016,<sup>52</sup> where the system of voluntary disclosures resulted in poor information and ineffective application of regulations.<sup>53</sup> As a consequence of this, the requirement of disclosure was reduced to a mere formality in these countries, perpetuating the institutional opaqueness that was prevalent even otherwise.

Therefore, countries like France have actively decided to implement mandatory regulations.<sup>54</sup> Voluntarily regimes of lobbying regulation indicate an interesting trend, whereby the lack of mandatory regulation results in the lack of sufficient information being made available to the public in order to ascertain the interests of lobbyist. This lack of disclosure does not in any way bring about any effect to assist individuals in society to identify attempts to lobby.<sup>55</sup> The vast majority of such regulations tend to request lobbyists to follow a code of conduct and register themselves, without any form of mechanism to ensure compliance.<sup>56</sup>

### III. PUBLIC CHOICE THEORY

Lobbying is deeply intertwined with the affecting of policy by corporations to bring about reforms that would be financially beneficial to them.<sup>57</sup> The inter-relationship between profiteering and policy-making has led to some scholars taking an economic approach towards lobbying.<sup>58</sup> This approach breaks down the financial benefits received by corporations as a result of policy change, while analysing the effects it has on the wider public.<sup>59</sup> One of the methods used to understand the impact of lobbying on politics, is

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<sup>50</sup> Grosek & Claros, *supra* note 23.

<sup>51</sup> *Id.*

<sup>52</sup> Library of Congress, *Lobbying Disclosure Laws: France*, available at <https://www.loc.gov/law/help/lobbying-disclosure/france.php> (Last visited on June 17, 2017).

<sup>53</sup> Holman & Luneburg, *supra* note 38.

<sup>54</sup> Grosek & Claros, *supra* note 23.

<sup>55</sup> *Id.*, 2-3; Charles Borden, *Lobbying The EU: New Requirements For A 'Voluntary' Regime*, 2-3, May 19, 2015, available at <http://www.allenoverly.com/SiteCollectionDocuments/Lobbying%20The%20EU%20New%20Requirements%20For%20A%20%27Voluntary%27%20Regime.pdf> (Last visited on June 17, 2017).

<sup>56</sup> *Id.*

<sup>57</sup> KENNETH M. GOLDSTEIN, *INTEREST GROUPS, LOBBYING AND PARTICIPATION IN AMERICA*, 4-10 (1999).

<sup>58</sup> Daniel A. Farber & Philip P. Frickey, *Jurisprudence of Public Choice*, 65 TEX. L. REV. 875-876 (1986).

<sup>59</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 32 (2004).

the public choice theory, which applies economic tools to political science and policy decision-making.<sup>60</sup>

The public choice theory views the process of legislative functioning as essentially negative, where the legislature works towards the creation of laws that address matters that meet their private interests as opposed to public interests.<sup>61</sup> It is based on the premise that the members of the legislature essentially face a conflict between their personal interests, the interests of the public at large and the interests of focus groups, including corporations.<sup>62</sup> As a result, political decision-making must involve a third player, namely citizens, to represent their interests and thereby create a “demand” for policy that is created in their favour.<sup>63</sup>

A presumption made when applying this theory is that politicians work to maximise voter appeasement so as to maximise their position in power.<sup>64</sup> However, unlike other political sciences, this theory places great focus on the economy. This is because it propounds that funding economic growth directly creates tangible results that are perceived by the voters, with additional variable factors such as political rhetoric and climate.<sup>65</sup> This gives the corporate lobbying groups the opportunity to place their agenda as the agenda of the people, even when the interests of business groups cannot always be aligned with the larger public interest.

The scholars of this theory argue that it applies only in cases where there is a two-party system – this becomes problematic as most countries follow a multi-party system, where it is rare to find a single party gaining absolute or true majority.<sup>66</sup> As a consequence of this, the parties in a multi-party system serve as delegations of the people, working as decision-making bodies on their behalf.<sup>67</sup> Therefore, if constituencies demand that certain regulations be enforced, policymakers would actively work towards the implementation of such regulations, as opposed to appeasing corporations.<sup>68</sup> However, this does not mean that regulations would only be necessary in two body systems, as in multi-party systems, the status quo may be skewed in favour of certain groups that often control the economic and social factors in society.<sup>69</sup>

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<sup>60</sup> *Id.*, 353-355.

<sup>61</sup> William N. Jr. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 277 YALE FACULTY SCHOLARSHIP SERIES PAPER 3824 (1988).

<sup>62</sup> Farber & Frickey, *supra* note 58, 899-901.

<sup>63</sup> *Id.*

<sup>64</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 16 (2004).

<sup>65</sup> STEINAR STROM, MEASUREMENT IN PUBLIC CHOICE 171 (2004).

<sup>66</sup> ENCYCLOPAEDIA OF PUBLIC THEORY 30-43 (2004) (Though USA does have a multi-party system, it shall be considered a two-party system owing to the dominance of the 2 major parties in the country).

<sup>67</sup> *Id.*, 815.

<sup>68</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 352-353 (2004).

<sup>69</sup> Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 1002-1004 (1995).



Thus, scholars of this theory believe that lobbying is a legitimate form of stakeholder representation and is governed by simple rules of demand and supply, as policymakers are influenced to take decisions in the interest of lobbyists if it offers them political advantage.<sup>70</sup> Regulation merely serves as a method by which a formal structure can be provided to lobbying and policy-making.<sup>71</sup>

In this process, the ratification of rules to monitor and manage policy-making per se is not hindered by the policymakers. This is because where parties have a significant majority, they continue to remain in power for longer periods and as a result, they determine the rules that would govern lobbying.<sup>72</sup> However, complication arises in the implementation of such regulations.<sup>73</sup> The rules often relate to the disclosure of such information, along with the registration of bodies that specifically handle lobbying for organisations.<sup>74</sup> Irrespective of the nature of lobbying, the rules would only be as effective as the authorities that implement the regulations choose to give effect to it. In most situations, the judiciary is regarded as the primary body that would handle matters relating to lobbying, implementing regulations on lobbying and policy-making. By clearly defining the rules and separating the regulatory control from the policymakers, it would, in effect, create barriers to the addressing of requirements and interests of voters, by shifting the onus of responsibility from the legislators to a mandatory regime to regulate matters relating to lobbying.<sup>75</sup>

Regulations of lobbying are necessitated as a result of the “public’s choice”.<sup>76</sup> Transparency and regulation in these processes amount to the creation of barriers that allow society as a whole to create a demand for socially pragmatic policies, as opposed to financially biased regulations.<sup>77</sup> Despite all the shortcomings, this theory offers structure in how a framework to regulate lobbying should look like and why policymakers would actively work towards creating such a regulation, in order to serve their own interests, by meeting the demands of the wider stakeholders.

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<sup>70</sup> Eskridge, *supra* note 61, 275-277.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, 347.

<sup>74</sup> Anthony J. Knowles, Total Lobbying, 84 – 85 (2006).

<sup>75</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 352-353 (2004).

<sup>76</sup> Knowles, *supra* note 74, 6-7.

<sup>77</sup> Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 456-460 (1988).

## IV. COUNTERING LOBBYING: GIVING THE POWER TO THE PEOPLE

One of the central measures of regulating lobbying is to curb misuse by corporations to direct policy that negatively impacts society; and one method to counter the negative effects of lobbying is to include a third-party<sup>78</sup> in the process of collecting information about lobbying, namely the voters. With India's rapid growth and increasingly simplified corporate regime, it becomes necessary to ensure that the public at large gets the opportunity to review policy, as corporations look like they are positioning to increase their power in the coming years.<sup>79</sup> In order to provide voters with the opportunity to make equal representations before their representativeness alongside lobbyists, the disclosure of information relating to lobbying can play a major role in the opportunities of citizens to counter lobbying and effectively express their interests.<sup>80</sup>

### A. INFORMATION AND LOBBYING

Often, the danger with lobbying is lack of transparency, resulting in a situation where each player is unaware of the interests of the other. This breakdown of information and communication can result in asymmetric information, where certain limited lobbyists have access to legislators and policy decision-making.<sup>81</sup>

In a system where there are three players, one of the most critical aspects for ensuring that lobbying takes place on an equitable basis is access to information.<sup>82</sup> According to the public choice theory, politicians control the political sphere<sup>83</sup> and decide the goals of policy making, whereas voters and interest groups create demands for a particular policy.<sup>84</sup> Therefore, there is a need to create legislative methods by which access to information can be ensured to a wider set of people. Lobbying for policy-making can take place at two stages,

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<sup>78</sup> Knowles, *supra* note 74, 6-7; ENCYCLOPAEDIA OF PUBLIC THEORY, 352-353 (2004).

<sup>79</sup> John Whalley, *Shifting Economic Power*, OECD PERSPECTIVES ON GLOBAL DEVELOPMENT (2009) (as a country begins to actively improve its economic regime, corporations look to new methods to improve profitability in that economy. In order to ensure that new policies that purely benefit corporations and work against the interests of individuals and society, there must be certain measures to protect individuals from such excesses).

<sup>80</sup> Ben Lockwood, *Voting, Lobbying, and the Decentralization Theorem*, ECONOMICS & POLITICS 20.3 416-431 (2008).

<sup>81</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 352-353 (2004).

<sup>82</sup> David Austen Smith, *Information and Influence: Lobbying for Agendas and Votes*, AMERICAN JOURNAL OF POLITICAL SCIENCE 799-802 (1993).

<sup>83</sup> Here, the political sphere means the ability of politicians to influence policy directly by casting their votes in favour of or against legislations.

<sup>84</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 352-353 (2004).

*i.e.* prior to elections and in the post-election phase.<sup>85</sup> During the election period, interest groups often fund political parties which promise to address the issues that they are concerned with, which meet their political interests, thereby implicitly influencing policy to meet their interests. Post-election lobbying usually takes place during parliamentary sessions. In both stages, the impact an interest group can have could influence policy for years to come.<sup>86</sup>

However, in terms of influencing policy, especially during the actual stages of policy-making, India has limited restrictions to prevent lobbying.<sup>87</sup> Despite anti-corruption regulations,<sup>88</sup> there is no direct restrictions on the kind of policy that can be lobbied for.<sup>89</sup> From a public choice theory perspective, all three players—politicians, corporations and citizens – in a political scheme have to be active participants to affect political outcomes; therefore, the opportunity to identify and lobby for a particular legislation should ideally be given to focus groups and voters at the same time.<sup>90</sup> Some scholars suggest that the process of influencing legislation in the Parliament should happen alongside the readings of the legislation.<sup>91</sup> The distinct advantage this provides is that all players are actively involved in understanding and interpreting a legislation, whereby each player has the opportunity to influence the outcome of the parliament's decision directly. In voluntary systems of lobbying regulations, the failure to address the availability of information results in ineffective information availability and tends to be counter-productive, by strengthening the position of interest groups in favour of public lobbyists.<sup>92</sup>

In order to ensure equitable and fair treatment, when receiving information about policy, voters must be given the chance to represent their interests during all stages of reading a legislation.<sup>93</sup> During the first and second readings of a legislation, representations to amend and modify it in order to satisfy the political inclinations and concerns of other Members of Parliament are generally belied. However, the access to information during this stage can prove critical to lobbyists. By statutorily ensuring that all parties involved get access to this information and have the opportunity to access their representatives, it

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<sup>85</sup> David Austen-Smith & John R. Wright, *Countering Lobbying*, AMERICAN JOURNAL OF POLITICAL SCIENCE VOL. 38, NO. 1, 25-27 (1994).

<sup>86</sup> Knowes, *supra* note 74.

<sup>87</sup> See Prevention of Corruption Act, 1988.

<sup>88</sup> See Part II.A.

<sup>89</sup> Constitutional limitations exist and the judiciary does frequently review legislations. However, at the parliamentary level, no safeguards exist to prevent the law from being lobbied for or against.

<sup>90</sup> ENCYCLOPAEDIA OF PUBLIC THEORY, 352-353 (2004).

<sup>91</sup> MARK KOBER-SMITH, LEGAL LOBBYING: HOW TO MAKE YOUR VOICE HEARD 79-85 (2000); Parliament of India, *How a Bill Becomes an Act*, available at <http://www.parliamentofindia.nic.in/ls/intro/p5.htm> (Last visited on June 18, 2017).

<sup>92</sup> See Part II. 3.

<sup>93</sup> *Id.*

can allow for a formalisation of the process of information simulation in the lobbying process.

The lack of any formal method to ensure access to information about policy places a dangerous precedent, whereby, certain powerful interest groups have priorities over and above the interests of the society at large. Inversely, complete prohibition of lobbying has shown indications of leading to widespread corruption, whereby corporations would take the opportunity of a completely inaccessible legislature and use underhand techniques to achieve their interests.<sup>94</sup> In India, where levels of corruption among all levels of government have been a matter of serious concern, such a step would allow voters to make representations in their interest, rather than giving precedence to groups that enjoy monetary advantages. When these three players actively involve themselves in this process, lobbying would be an activity that is seen as an active participation of society at large to address their policy requirements, and side-by-side offer interest groups the chance to reflect alternative points of view.

## B. THE POWER TO COUNTER LOBBY

Although it is desirable to allow voters the chance to counter lobby,<sup>95</sup> especially in situations where powerful interest groups work to get laws enacted that work against the interests of the society, there arises the problem that interest groups will work to ensure that any measure to curtail their power is limited.<sup>96</sup> Interest groups are better organised and better equipped to communicate with policymakers. This results in a situation where it becomes virtually impossible to counter lobby, despite the information being accessible to voters.<sup>97</sup>

Such a situation, public choice theorists<sup>98</sup> believe, will lead to political instability. The failure of the legislature to accurately reflect the interests of the members of society would result in the assimilation of political power in the hands of a few.<sup>99</sup> Such a power structure would ultimately result in lack of

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<sup>94</sup> AMY HANDLIN, *DIRTY DEALS? AN ENCYCLOPEDIA OF LOBBYING, POLITICAL INFLUENCE, AND CORRUPTION*, 885-886 (2014).

<sup>95</sup> Lee Drutman, *The solution to lobbying is more lobbying*, April 29, 2015, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2015/04/29/the-solution-to-lobbying-is-more-lobbying/?utm\\_term=.ada9f14179a0](https://www.washingtonpost.com/news/monkey-cage/wp/2015/04/29/the-solution-to-lobbying-is-more-lobbying/?utm_term=.ada9f14179a0) (Last visited on June 18, 2017) (To counter lobby means to address the actions of lobbyists, primarily interest groups, by organising public lobbying organisations (or even personal means) to “counter” lobby in the interest of society at large).

<sup>96</sup> HANDLIN, *supra* note 94.

<sup>97</sup> Smith & Wright, *supra* note 85.

<sup>98</sup> See Deniz Igan, Prachi Mishra, & Thierry Tressel, *A Fistful of Dollars: Lobbying and the Financial Crisis*, NBER MACROECONOMICS ANNUAL 26.1, 195-197 (2012).

<sup>99</sup> See Kevin Albertson, *How the Economics of Lobbying make Democracy About More than Votes*, May 6, 2015, available at <http://theconversation.com/>

accountability to voters.<sup>100</sup> Formalising a system to offer voters the opportunity to counter lobby, through equal representation or in some cases even formalised channels, thus becomes necessary. In the long run, regularising lobbying may offer individuals the opportunity to examine the considerations made by the government, as opposed to a situation where the functioning of the government is behind closed doors and direct lobbying has been curtailed.

The need of the hour is not simple registration of lobbyists, but rather, expanding the opportunity of individuals to express their interests during the policy-making. Two interesting accounts of opportunities to counter-lobby can be seen in the USA and in the EU.

In the USA, the right to lobby is seen as an extension of free speech, protected by the Constitution.<sup>101</sup> Although, this right is recognised, counter lobbying has proved to be a relatively futile exercise, as corporations tend to have better organised systems that allow for navigation through the layers involved in accessing the legislators.<sup>102</sup> This has resulted in the vast majority of lobbying being entirely in the interest of corporations, who use these avenues to unfairly influence policy decision-making.<sup>103</sup> Despite having a mandatory lobbying system, the transparency has resulted in inefficient protection of individual interests.

Interestingly, the EU does actively recognise the usage of lobbying.<sup>104</sup> However, in contrast, lobbying in the EU tends to take a citizen first approach. This is primarily attributed to two main factors – the lack of support for big corporations in the EU and its strong status quo maintained by regulations to protect citizens.<sup>105</sup> This has led to the vast majority of lobbying done by public interest groups to have resulted in successful initiatives in the EU.<sup>106</sup>

In both situations, the opportunity to counter-lobby exists, however, in the EU the power of corporations has been diminished in favour of the

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how-the-economics-of-lobbying-make-democracy-about-more-than-votes-40394 (Last visited on June 18, 2017).

<sup>100</sup> *Id.*

<sup>101</sup> Allard, *supra* note 43, 23-30.

<sup>102</sup> Smith & Wright, *supra* note 85.

<sup>103</sup> Gilens & Page, *supra* note 45.

<sup>104</sup> Anthony Chambers, *The Lobbying of the EU - How to achieve greater transparency*, CIVITAS (2015) 3, available at <http://www.civitas.org.uk/content/files/Anthony-Chambers-EU-lobbying.pdf> Last visited on June 18, 2017) (the EU only has a voluntary register to identify lobbyists and there is no mandatory system. However, it actively encourages the sharing of views by interest groups and corporations.).

<sup>105</sup> Andreas Dür, Patrick Bernhagen & David Marshall, *Contrary to popular opinion, business actors are less successful than citizen groups at lobbying EU legislators*, February 18, 2015, available at <http://bit.ly/1A4o8nW> (Last visited on June 18, 2017) (these regulations do not necessarily have to address matters of lobbying but rather address the needs of citizens and solvers a bedrock to protect their interests).

<sup>106</sup> *Id.*

interest of the wider public. Strong regulations in the interests of citizens have allowed for better representation and a greater number of successful lobbying initiatives in their interest. Countries can look to possibly implement guidelines that encourage and protect lobbying by public lobbyists.

## V. CONCLUSION

With the vast majority of countries allow some form of lobbying, creating an absolute restriction on lobbying leads to a situation wherein two players, namely the politicians and interest groups, are the only stakeholders that represent interests in policy-making leading to a situation of political instability. This would limit the impact of voters in policy making processes as active participants in the policy-making framework. While it cannot be said that regulation of corporate lobbying would completely save governmental policy from being infested with vested interests of corporate giants, disclosure would at least ensure that it does not evade public scrutiny. In a country where the practice of lobbying is endemic, leaving it unregulated in the grey areas of law would only open-up loopholes for abuse.

It is in this background that the public choice theory offers an understanding as to how people can go about including an additional player to offer a greater degree of reliability to the present practice. The PCT expands political decision-making beyond merely interest groups and politicians, to even include citizens as active stakeholders. According to PCT, this results in policy considerations that tend to focus on meeting the interests of all stakeholders equally, without providing unfair advantages to certain groups, based on the demand of a certain policy.

To do this information forms the bedrock for trust between the three players and ensures a degree of fair play, despite interest groups possessing better means to push for organised and effective schemes of lobbying. Particularly from instances like that of Walmart, it becomes more imperative to ensure that there is transparency in the dealings with corporations. While there currently exist, regulations preventing excessive political spending and corruption, one of the underlying strengths of having a concise and well-defined lobbying framework is to ensure that citizens are aware of the source of policy decisions and can make targeted efforts to protect their own interests. The vast majority of existing regulations tends to focus on holding lobbyists accountable for maintaining transparent functioning, however wider stakeholder participation would be necessary to bring about change in the existing lobbying practices. By allowing all stakeholders, in particular citizens, to represent their interests the policy implications for the public at large could allow for policy that actively takes consideration the interests of citizens, as opposed to seeing citizens as passive players.